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Supreme Court, U.S.
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No.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

SAMUEL MESNICK,
Petitioner,

v.

GENERAL ELECTRIC COMPANY,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI OF PETITIONER SAMUEL MESNICK

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Dated: March 6, 1992

QUESTIONS PRESENTED

1. Whether in an action under the Age Discrimination in Employment Act a plaintiff who has presented evidence that the employer's stated reason for the adverse employment decision was pretextual must also further present evidence of discriminatory animus in order to survive an employer's motion for summary judgment?

2. Whether in an action for retaliation under the Age Discrimination in Employment Act a plaintiff who has presented evidence that the employer's stated reason for the adverse employment decision was pretextual must also further present evidence of retaliatory animus in order to survive an employer's motion for summary judgment?

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PETITION FOR WRIT OF CERTIORARI OF PETITIONER SAMUEL MESNICK

Petitioner Samuel Mesnick (hereinafter "Mr. Mesnick") hereby petitions this Court for a writ of certiorari to review the judgment of the United States Court

of Appeals for the First Circuit affirming the grant of summary judgment by the United States District Court for the District of Massachusetts in favor of General Electric Company (hereinafter "GE") on Mr. Mesnick's claims under the Age Discrimination in Employment Act, 29 U.S.C. s. 621 et seq., and other statutes.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 950 F.2d 816 and is reprinted beginning at page A-1 of the Appendix, infra. The District Court's opinion is reported at 55 Fair Empl. Prac. Cas. (BNA) 1291 (D. Mass. 4/15/91) and is reprinted beginning at page B-1 of the Appendix, infra.

JURISDICTION

The judgment of the Court of Appeals was entered on December 16, 1991. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. s. 1254(1).

STATUTES INVOLVED

This case involves the Age Discrimination in Employment Act, 29 U.S.C. s. 621 et seq., which in section 623 provides in relevant part:

> "(a) It shall be unlawful for an employer --
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;"
>
> ...
>
> "(d) It shall be unlawful for any employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to

> discriminate against any member thereof or applicant for membership, because such individual, member, or applicant for membership, has opposed any practice made unlawful by this section, or because such individual, member, or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this Act."

This case also involves Rule 56(c) of the Federal Rules of Civil Procedure, which provides in relevant part:

> "The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

STATEMENT OF THE CASE

This case was filed in the United States District Court for the District of Massachusetts on July 5, 1989. That Court had jurisdiction under 28 U.S.C. s.

1331.

In this action Mr. Mesnick alleged that a new GE manager discriminated against him on the basis of age when that manager negatively evaluated his job performance, cut his expected salary increase in half, replaced him with someone twenty two years younger than he and then fired him when he protested against this. GE responded by stating that it took the action it did because of Mr. Mesnick's purported insubordination.

Evidence of Pretext

The First Circuit ruled that Mr. Mesnick created a triable issue of fact in support of his claim that GE's stated reason for his discharge was pretextual. (App. A-30). The following is a short summary of some of Mr. Mesnick's evidence

of pretext. (Because this case was decided on summary judgment it is of course acknowledged that GE disputes some of this evidence.)

Mr. Mesnick is a lawyer by training with over 30 years experience in the area of government contracts. In 1974 Radio Corporation of America ("RCA") hired him as a Senior Contracts Administrator at its Burlington, Massachusetts, plant. He was promoted several times, becoming in 1983 the Manager of the Contracts Administration department. As such he reported to the Director of Finance.

In 1986 GE purchased RCA, and in January, 1987, it installed new management at the Burlington plant. Achilles Georgiou then became the Director of Finance at a time when Mr. Mesnick was 64 years of age.

Then in February, 1987, after being on the job for a month, Mr. Georgiou cut Mr. Mesnick's anticipated annual increase from $4,000 to $2,000, and on March 7, 1987, Mr. Georgiou wrote an evaluation of Mr. Mesnick's job performance which was largely negative. Mr. Georgiou ended the evaluation by recommending that Mr. Mesnick was best suited "to pursue a private career of a federal procurement consultant."

Upon receipt of this performance review Mr. Mesnick sent Mr. Georgiou two memos, complaining of the unfair treatment and asking how Mr. Georgiou could make a quick evaluation without first discussing it with Mr. Mesnick. Mr. Georgiou never responded to either memo.

In April, 1987, one of Mr. Mesnick's subordinates named Mark Sherman, a man in

his thirties, tendered his resignation. Upon learning this Mr. Georgiou told Mr. Sherman that he (Mr. Georgiou) was "sad to lose the youth of the work force" and that he was looking for a new Manager of Contracts Administration who would have also have responsibility for a much smaller contracts department in a Huntsville, Alabama, plant. Mr. Georgiou said that this would provide room for advancement for a person such as Mr. Sherman.

It was from Mr. Sherman that Mr. Mesnick first learned that Mr. Georgiou was planning on creating a new Manager of Contracts Administration position.

Disturbed to hear indirectly that his job was being re-organized, Mr. Mesnick on April 21, 1987, approached Mr. Georgiou to discuss this. Mr. Georgiou

admitted that he was going to create this position and with a clouded face said that Mr. Mesnick would be eligible to apply. Mr. Mesnick replied that once Mr. Georgiou posted the opening, he would apply for it. (It was part of GE's Affirmative Action Policies to post job openings and promote from within.)

Contrary to policy Mr. Georgiou never posted the new Manager of Contracts Administration position.

Mr. Georgiou never even interviewed Mr. Mesnick for the new Manager of Contracts Administration position, although he admitted in deposition that Mr. Mesnick was qualified for the job. Mr. Georgiou claimed that he did not interview Mr. Mesnick only because Mr. Mesnick said that he was not interested in the position. Mr. Mesnick flatly denies that

he ever indicated that he was not interested in the position; in fact he was very interested in it.

During the summer and fall of 1987, using the services of a search firm, Mr. Georgiou interviewed four outside candidates for this position. In each case Mr. Georgiou was provided with the age of the candidate.

Meanwhile on GE's behalf Mr. Mesnick negotiated a contract settlement in the amount of $1,986,955, which represented a profit of about 1/3rd of Burlington's total 1987 profits. Therefore in August, 1987, Mr. Mesnick asked Mr. Georgiou if he would still write the same negative performance evaluation. Mr. Georgiou replied that he would not change his evaluation.

On November 20, 1987, Mr. Georgiou

informed Mr. Mesnick that he had hired Steven Tubbs to be the new Manager of Contract Administration. (Mr. Tubbs was then 42 years of age and by his own admission had far less experience in government contracts than Mr. Mesnick had.) Mr. Georgiou further said that he was relieving Mr. Mesnick from all of his supervisory duties and having him report to Mr. Tubbs. Mr. Mesnick was given the responsibility of handling "special projects."

In February, 1988, Burlington needed a representative from the contracts department to attend a GE meeting in Philadelphia about a topic that was within Mr. Mesnick's purview. Yet Mr. Georgiou advised Mr. Tubbs to send "anyone but Sam."

As the problems continued, Mr. Mesnick

on June 22, 1988, wrote a lengthy memo to the General Manager of the plant, Sal Capodici, outlining his ongoing complaint and criticizing Mr. Georgiou.

On July 18, 1988, Mr. Capodici responded by giving Mr. Mesnick his one and only written warning, stating that Mr. Mesnick's prior memo was "gross insubordination" and an "attack on management" and that any recurrence would constitute "cause for immediate dismissal."

On July 19, 1989, Mr. Tubbs advised Mr. Mesnick that he would not be getting any salary increase and gave him another decidedly negative performance review. Moreover, Mr. Mesnick was relocated to a smaller, windowless office, away from the contracts department.

On September 7, 1988, Mr. Mesnick

responded by sending a memo to Mr. Tubbs, with a copy to Mr. Georgiou, in which he attempted to demonstrate how Mr. Tubbs' evaluation of him was inaccurate.

On September 16, 1988, Mr. Georgiou fired Mr. Mesnick, stating that Mr. Mesnick's "attacks on members of management ... cannot be tolerated."

Holding of First Circuit

After discovery in this case was completed, GE moved for summary judgment on November 1, 1990. On April 15, 1991, the District Court for the District of Massachusetts granted GE's motion, ruling that Mr. Mesnick had the burden not only of proving that the articulated reasons of the employer were pretextual, but also of adducing additional evidence that the articulated reasons were a pretext for

age discrimination, and in that regard his evidence failed. (App. B-23 - B-25).

On appeal the First Circuit affirmed the granting of summary judgment. It held that as a matter of law "a plaintiff must offer some minimally sufficient evidence, direct or indirect, both of pretext and of the employer's discriminatory animus to prevail in the face of a properly drawn Rule 56 motion." (App. A-28)

As to the facts of this case the First Circuit ruled that Mr. Mesnick had produced evidence of pretext but not of discriminatory animus and that the latter was fatal to his case.

> "[Mr. Mesnick] claims to have adduced proof of both pretext and discriminatory animus, thereby sidestepping summary judgment. We agree, in part, for Mesnick created a triable issue of fact anent pretext vel non. We disagree, however, as to the second half of the equation. Like the

court below, we are unable to find in this record enough evidence of age discrimination to withstand brevis disposition. That ends the matter." (App. A-30 - A-31)

Likewise, in regard to the retaliation claim, the First Circuit ruled that Mr. Mesnick "failed to carry his burden of adducing evidence adequate to create a triable issue on GE's retaliatory animus." (App. A-37, n.10)

REASONS FOR GRANTING THE PETITION

THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF THIS COURT AND OTHER CIRCUITS ON AN IMPORTANT ISSUE AFFECTING ALL EMPLOYMENT DISCRIMINATION CASES.

A. The Decision Below That a Discrimination Plaintiff, Who Has Presented Evidence That the Employer Is Lying About Its Reason For the Adverse Employment Decision, Must Nevertheless Present Other Evidence of Discriminatory Animus in Order to Survive Summary Judgment Conflicts With the Decisions of This Court.

In this case the First Circuit has held that even if a discrimination plaintiff has evidence that the employer's stated reason for the adverse employment decision is pretextual and is not worthy of credence, that plaintiff will still not survive summary judgment unless there is also evidence of discriminatory animus. In other words, even if the plaintiff has evidence that the employer is lying about why it took the action it did, that

plaintiff without more is not even entitled to a trial on the merits.

The First Circuit's holding in this case conflicts with the decisions of this Court, especially the unanimous decision of Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981).

Under Burdine, in order to prove intentional discrimination, the plaintiff first must establish a prima facie case of discrimination (as outlined in the earlier unanimous decision of McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).) If that is done, then the defendant need only articulate a legitimate, non-discriminatory reason for its action. The defendant need not prove that the reasons offered are true; the burden is of production only. Burdine, 450 U.S. at 253-254.

If a non-discriminatory reason is

articulated by the defendant, then the plaintiff has "an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not the true reasons, but were a pretext for discrimination." Id. at 253.

In Burdine this Court unanimously held that a plaintiff can meet that ultimate burden of proving intentional discrimination either directly or "indirectly by showing that the employers's proffered explanation is unworthy of credence."

> "The plaintiff retains the burden of persuasion. She now must have the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision. This burden now merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination. She may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." Id.

at 256 (emphasis added).

The First Circuit's holding in the instant case is in direct conflict with the holding in Burdine that a plaintiff can indirectly prove that he or she was a victim of intentional discrimination by showing that the employer's stated reason for the adverse employment action is pretextual, that is, that it is a lie. In circumstances where under Burdine a discrimination plaintiff has indirect evidence that he or she was a victim of intentional discrimination, the First Circuit will not even allow a trial to be held.

The net effect of the First Circuit's ruling is to severely limit the use of indirect evidence of discrimination. This is highly prejudicial to discrimination plaintiffs because circumstantial evidence

is to be expected in discrimination cases given the complexity of the issues and the difficulty, in this rights conscious era, of producing direct evidence of discrimination.

Hence review of this case is warranted inasmuch as the First Circuit is in direct conflict with a unanimous decision of this Court on an important issue.

B. The Decision Below That a Discrimination Plaintiff, Who Has Presented Evidence That the Employer Is Lying About Its Reason For the Adverse Employment Decision, Must Nevertheless Present Other Evidence of Discriminatory Animus in Order to Survive Summary Judgment Conflicts With the Decision of Other Circuits.

In the decision below the First Circuit has held that even if the plaintiff has evidence that the employer is lying about why it took the action it

did, that plaintiff without more is not even entitled to a trial on the merits. The First Circuit as a matter of law will not therefore allow any inference of discrimination to be made even though the employer is lying under oath.

There is a significant split among the among the Circuits on this issue as to whether evidence of pretext constitutes indirect evidence of discrimination. Nine Circuits are in direct conflict with the First Circuit's position while two others may support this position. Discrimination plaintiffs with identical proofs therefore often have different results depending upon where the case arises. See Catherine J. Lanctot, The Defendant Lies and the Plaintiff Loses: The Fallacy of the "Pretext-Plus" Rule in Employment

Discrimination Cases, 43 Hastings Law Journal 59 (1991).

In direct conflict with the First Circuit, most Circuits have held that an employment discrimination plaintiff will not only survive summary judgment but may also ultimately prevail by showing that the employer's stated reason for the adverse employment action is untrue without having to produce any additional evidence of discriminatory animus. This is the holding of the Courts of Appeal for the Second, Third, Fifth, Sixth, Eighth, Ninth, Tenth, Eleventh, and District of Columbia Circuits. See Ramseur v. Chase Manhattan Bank, 865 F.2d 460, 465 (2nd Cir. 1989) ("A showing that a proffered justification is pretextual is itself sufficient to support an inference that the employer intentionally

discriminated.); Chipollini v. Spencer Gifts, Inc., 814 F.2d 893, 899 (3rd Cir.) (en banc) ("If the plaintiff [shows] that it is more likely than not that the employer did not act for its proffered reason, then the employer's decision remains unexplained and the inferences from the evidence produced by the plaintiff may be sufficient to prove the ultimate fact of discriminatory intent..."), cert. dismissed, 483 U.S. 1052 (1987); Norris v. Hartmarx Specialty Stores, 913 F.2d 253, 255-256 (5th Cir. 1990) (plaintiff's proof that the reasons for her discharge were pretextual entitled her to judgment under Title VII); Tye v. Board of Educ., 811 F.2d 315, 319-320 (6th Cir.) ("plaintiff may indirectly prove intentional discrimination by showing that the

defendants' justifications are untrue and therefore must be a pretext."), cert. denied, 484 U.S. 924 (1987); MacDissi v. Valmont Indus., 856 F.2d 1054, 1059 (8th Cir. 1988) ("an employer's submission of a discredited explanation for firing a member of a protected class is itself evidence which may persuade the finder of fact that such unlawful discrimination actually occurred."); Samarzia v. Clark County, 859 F.2d 88, 92 (9th Cir. 1988) (directed verdict is inappropriate where plaintiff has presented sufficient evidence to enable the jury to reject defendant's proffered reason as unworthy of credence.); Drake v. City of Fort Collins, 927 F.2d 1156, 1160 (10th Cir. 1991) ("The burden then shifts back to plaintiff, who must then show that the defendant's reasons are a pretext for

discrimination, i.e., that the proffered reasons were not the true reasons for the hiring."); Sparks v. Pilot Freight Carriers, Inc., 830 F.2d 1554, 1564 (11th Cir. 1987) ("The implausibility of the alleged justification is sufficient to create a genuine issue of material fact as to whether [the defendant's] articulated reason is pretextual," and this "raise[s] a genuine issue of material fact as to whether [the defendant] had a discriminatory motive."); Krodel v. Young, 748 F.2d 701, 707 (D.C. Cir. 1984) (discrimination may be inferred from the prima facie case and discrediting the employer's proffered reason), cert. denied, 474 U.S. 817 (1985).

The law on this issue in the Fourth and Seventh Circuits, however, is

somewhat unclear, although there seems to be some support for the First Circuit's position. See Duke v. Uniroyal, Inc., 928 F.2d 1413, 1417 (4th Cir. 1991) ("the plaintiff must then prove that the reason given was a mere pretext for discrimination and that age was a more likely reason for the employment action."); Friedel v. City of Madison, 832 F.2d 965, 975 (7th Cir. 1987) ("Plaintiffs must allege and support not only pretext, but also that the [defendant's] actions were pretext for discrimination on a prohibited characteristic...").

Inasmuch as there is a split among the Circuits on the issue as to what kind of evidence is necessary to warrant trial in employment discrimination cases, an issue which obviously affects each and

every employment discrimination plaintiff and a split which is causing inconsistent results among the Circuits in employment discrimination cases, review is appropriate.

C. The Decision Below Concerns An Important Issue Affecting All Employment Discrimination Cases.

The issue as to whether an ADEA plaintiff can indirectly prove that he or she was a victim of intentional discrimination by showing that the employer's reason for the adverse employment action is not worthy of credence is an important issue affecting all types of discrimination case.

It is well settled that the analysis developed by this Court under McDonnell Douglas and Burdine, which were cases brought under Title VII of the 1964 Civil

Rights Act (42 U.S.C. s. 2000e et seq.), also applies to cases brought under the ADEA, the Civil Rights Act of 1866 (42 U.S.C. s. 1981), the Rehabilitation Act of 1973 (29 U.S.C. s. 701 et seq.), Title IX of the Education Amendments of 1972 (20 U.S.C. s. 1681), and section 510 of the Employee Retirement Income Security Act of 1974 (ERISA) (29 U.S.C. s. 1140). See, e.g., Patterson v. McLean Credit Union, 491 U.S. 164 (1989) (Civil Rights Act of 1866); Lipsett v. University of P.R., 864 F.2d 881 (1st Cir. 1988) (Title IX); Dister v. Continental Group, 859 F.2d 1108 (2nd Cir. 1988) (ERISA); Sutton v. Atlantic Richfield Co., 646 F.2d 407 (9th Cir. 1981) (ADEA); Davis v. Frank, 711 F.Supp. 447 (N.D. Ill. 1989) (Rehabilitation Act). Therefore all these different kinds of employment

discrimination cases are affected by the decision below and the split in the Circuits.

Furthermore this is a critical issue in employment discrimination law. As one commentator has stated, "disparate treatment cases are won or lost on the pretext issue." Hannah A. Furnish, Formalistic Solutions to Complex Problems: The Supreme Court's Analysis of Individual Disparate Treatment Cases Under Title VII, 6 Indus. Rel. L.J. 353, 357-58 (1984). Hence the decision below directly relates to an issue that goes to the heart of each and every discrimination case of all varieties.

CONCLUSION

This case presents important questions regarding the ability of an employment discrimination plaintiff to indirectly prove intentional discrimination. These questions have been answered differently by various Courts of Appeal with differing results. Therefore the petition for a writ of certiorari should be granted.

Respectfully submitted

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Dated: March 6, 1992

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 91-1451

SAMUEL MESNICK,
Plaintiff, Appellant

v.

GENERAL ELECTRIC COMPANY,
Defendant, Appellee

APPEAL FROM THE UNITED STATES
DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Rya W. Zobel, U.S. District Judge]

Before

Selya, Circuit Judge,

Coffin, Senior Circuit Judge,

and Cyr, Circuit Judge.

Scott A. Lathrop with whom Scott A. Lathrop, P.C. was on the brief for appellant.

David H. Erichsen with whom Susan M. Curtin and Hale and Dorr were on the brief for appellee.

December 16, 1991

SELYA, Circuit Judge. This appeal calls upon us, in the course of determining whether an employer transgressed the law in its dealings with a former employee, to map the much traveled but little understood intersection between Rule 56 of the Civil Rules and the burden-shifting framework for discrimination cases first crafted by the Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). For the reasons that follow, we affirm the entry of summary judgment in the employers favor.

I. BACKGROUND

Recognizing the dictates of Fed. R. Civ. P. 56(c), we scan the record in the light most congenial to the summary judgment loser and draw all reasonable

inferences to his benefit.

In 1974, Radio Corporation of America (RCA) hired plaintiff-appellant Samuel Mesnick, a lawyer by training, to work as a senior contracts administrator at its plant in Burlington, Massachusetts. Mesnick was then fifty-one years of age. He was promoted several times, eventually becoming the manager of contracts administration. In 1986, defendant-appellee General Electric Company (GE) purchased RCA's business and installed new management at the Burlington facility. Achilles Georgiou became director of finance, and thus, Mesnick's immediate superior. Georgiou discussed Mesnick's job performance with Mesnick's former supervisors, receiving mixed reviews. Georgiou was told good things about Mesnick's technical competence. He

was also told, however, that Mesnick had at times shown himself to be a vulgar, bigoted, sexist lout who insulted subordinates, offended clients, drank to excess during lunch, and so forth. On March 7, 1987, Georgiou wrote his initial evaluation of Mesnick's performance. It was largely negative.[1] In closing, Georgiou suggested that Mesnick out to "pursue a private career of a federal procurement consultant." Instead of the $4,000 raise that he had anticipated, Mesnick received a $2,000 raise.

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1 Mesnick challenged the fairness of both the unflattering characterizations of his prior service and Georgiou's resultant evaluation. He did not dispute, however, that Pressman, Stockton, and Kupec, Mesnick's bosses during his RCA days, informed Georgiou about a panoply of Mesnick-related problems. Indeed, RCA's management had informed Mesnick himself about certain complaints no later than the winter of 1985-1986.

Later on, a meeting was held in which Mesnick complained to Georgiou about unfair treatment in these matters. At the same time, the men discussed an expected reorganization of the contracts department (the Department). As part of this reorganization, GE planned to instate a supervisory position, the holder of which would be in charge of departmental operation at both Burlington and GE's facility in Huntsville, Alabama.[2] The new position entailed many of the plaintiff's previous responsibilities. Mesnick expressed an interest in finding out more about the job, although he voiced some reservations

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2 Mesnick first learned of the new position form one of his subordinates, Mark Sherman, who resigned from GE to seek greener pastures. During his exit interview, Sherman was apprised of the realignment by Georgiou and thereafter mentioned it to Mesnick.

about the involvement of "hanging judge" -an apparent reference to Georgiou - in the selection process.

Following this unfruitful meeting, Mesnick attempted to go over Georgiou's head. On April 23, 1987, he sent a memorandum to Salvatore Capodici, the Burlington plant's top executive. In the memorandum, Mesnick remonstrated, generally, about Georgiou's leadership of the Department; complained, specifically, about Sherman's advanced knowledge of the new position, see supra note 2; and raised the boggart of possible age discrimination. Mesnick's criticism of Georgiou continued in a series of memoranda to, and conversations with, Capodici, and in sundry communications with subordinates. Among other things, he produced and presented for Capodici's

edification a slide show belittling Georgiou's performance and capabilities. He also circulated notes to fellow employees exploring the idea of jumping ship and joining a rival company.

Mesnick never applied for the position as manager of the Department. On December 14, 1987, after a national search, GE named Steve Tubbs, age forty-two, to the vacancy. Mesnick was assigned to a different office and given the title of "manager, special projects." His salary and benefits unscathed, but his new post was under Tubbs and lacked supervisory power over other employees. Left as an emperor without an empire, Mesnick fired off a letter to Capodici explicitly criticizing Georgiou's integrity, professional honesty, and competence.

From that point forward, the situation plunged downhill. On one occasion, upset with Capodici, Mesnick boldly directed profanity at him. On another occasion, Mesnick received a warning from Georgiou in respect to attendance problems. On January 21, 1988, Mesnick filed charges with the Equal Employment Opportunity Commission (EEOC) alleging that GE violated the Age Discrimination in Employment Act (ADEA), 29 U.S.C. ss. 621-634 (1988), and its Massachusetts analogue, Mass. Gen. L. ch. 151B (1990), by failing to promote him and, instead, hiring Tubbs. GE learned of the charges on January 26, 1988.

That February, Mesnick and his superiors tangled regarding a self-evaluation form that GE asked Mesnick to complete. He adamantly refused, claiming

he was under no obligation to fill out the form. Over the next four months, a bad situation grew steadily worse.[3] Mesnick sent a flurry of memoranda to his superiors roasting Tubbs and Georgiou. These communiques culminated in a missive to Capodici, dated June 22, which requested a formal performance evaluation, excoriated Georgiou's "professional ignorance," and denigrated Tubbs' professional stature. On July 18, 1988, Capodici informed Mesnick that he considered the missive tantamount to "gross insubordination," warned him that his "insubordinate behavior" was "totally

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3 Among other things, Mesnick's attendance problems persisted. On March 28, 1988, Tubbs registered a "20.10 concern" because Mesnick had been absent without noting the absence on his time card. Under internal GE policy, a 20.10 concern is a vehicle for submitting reports anent questionable practices by fellow employees.

unacceptable," and stated that any recurrence would constitute "cause for immediate dismissal."

On the same day, despite his enduring failure to complete the self-evaluation form, Mesnick received a performance evaluation from Tubbs. Tubbs rated Mesnick's overall performance "marginally acceptable." While acknowledging Mesnick's "extensive contractual technical experience," Tubbs stated that these talents were "negated by his lack of interpersonal skills/confrontational attitude, contentiousness, disregard for management direction and policy, and inability/unwillingness to fulfill managerial grade expectations." Mesnick received no merit increase for 1988. Moreover, he was relocated to a smaller office, away from the Department.

Undaunted, Mesnick responded by filing a 20.10 concern in which he branded Tubbs' handling of Mesnick's unauthorized absences as derelict an suggested that Tubbs be fired. After an investigation, Tubbs was exonerated. On September 7, 1988, Mesnick circulated yet another billet-doux. In it he renewed his attack on Tubbs, attempted to rebut the recent (unfavorable) performance evaluation, and alleged that his superiors were retaliating against him because he had preferred discrimination charges. Nine days later, the ax fell: GE terminated Mesnick's troubled tenure on grounds of insubordination and failure to work harmoniously with others. The plaintiff promptly filed another complaint with the EEOC. After the EEOC determined both complaints were meritless, this suit was

instituted.

II. THE SUMMARY JUDGMENT STANDARD

In civil procedure, summary judgment's role is "to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." Garside v. Osco Drug, Inc., 895 F.2d 46, 50 (1st Cir. 1990) (citation omitted); see also Celotex Corp. v. Catrett, 477 U.S. 317, 323-24 (1986). Since appellate review of a grant of summary judgment is plenary, the court of appeals, like the district court, "must view the entire record in the light most hospitable to the party opposing summary judgment, indulging all reasonable inferences in that party's favor." Griggs-Ryan v. Smith, 904 F.2d 112, 115 (1st Cir. 1990). An appellate panel is not restricted to

district court's reasoning but can affirm a summary judgment on any independently sufficient ground. Garside, 895 F.2d at 48-49. In the end, the entry of summary judgment can be upheld only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

The Rule 56 pavane has a distinctive set of steps. When requesting summary judgment, the moving party "must put the ball in play, averring 'an absence of evidence to support the nonmoving party's case.'" Garside, 895 F.2d at 48 (quoting Celotex, 477 U.S. at 325). The nonmovant must then document some factual

disagreement sufficient to deflect brevis disposition. Not every discrepancy in the proof is enough to forestall a properly supported motion for summary judgment; the disagreement must relate to some genuine issue of material fact. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986); Medina-Munoz v. R.J. Reynolds Tobacco Co., 896 F.2d 5, 8 (1st Cir. 1990). Genuine issues of material fact are not the stuff of an opposing party's dreams. On issues where the nonmovant bears the ultimate proof, he must present definite, competent evidence to rebut the motion. See Anderson, 477 U.S. at 256-57; Garside, 895 F.2d at 48. This evidence "cannot be conjectural or problematic; it must have substance in the sense that it limns differing versions of the truth which a factfinder

must resolve at an ensuing trial." Mack v. Great Atl. & Pac. Tea Co., 871 F.2d 179, 181 (1st Cir. 1989); see also Anderson, 477 U.S. at 249-50 (evidence that "is merely colorable or is not significantly probative" cannot deter summary judgment) (citation omitted).

Over time, summary judgment has proven its usefulness as a means of avoiding full-dress trials in unwinnable cases, thereby freeing courts to utilize scarce judicial resources in more beneficial ways. Hence, while courts should apply the controlling standards carefully in all cases - and especially in cases that present difficult issues of proof- summary judgment can be appropriately entered even where elusive concepts such as motive or intent are involved. See, e.g., Medina-Munoz, 896 F.2d at 8.

III. THE DISCRIMINATION CLAIM

We consider, first, the claim of discrimination. Although the plaintiff tries to balkanize this claim into several segments - he contends, inter alia, that GE violated the ADEA by evaluating his work performance in an unfairly negative fashion, cutting his slated salary increase, impeding his ability to apply for the position of contracts manager, hiring a younger person for that position, failing to promote him, demoting him, and terminating him - and the district court analyzed it in that fragmented fashion, see Mesnick v. General Elec. Co., 1991 WL 61481, 55 Fair Empl. Prac. Cas. (BNA) 1291, 57 Empl. Prac. Dec. (CCH) p. 40,992 (D. Mass. April 15, 1991), we believe that Mesnick's discrimination case must

rise or fall on whether he offer sufficient facts to show that he was wrongfully discharged by reason of his age.[4]

A.

The plaintiff in an ADEA discrimination suit bears the ultimate "burden of proving that his years were the

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4 Without belaboring the point, we note that the plaintiff's other claims of discrimination, to the extent cognizable at all, have been convincingly dispatched in the district court's memorandum of decision. Because plaintiff did not make out a prima facie case on most (if not all) of those claims, and because the evidentiary hole that sinks the claim of discriminatory discharge, see infra Part III(B), is equally fatal to the other claims if reviewed piecemeal, we perceive no point in pursuing an endless series of separate analyses. There is, however, one exception: in Part IF, infra, we examine independently the claim that GE violated the ADEA not by age discrimination, but by retaliating against Mesnick when he complained of such discrimination.

determinative factor in his discharge, that is, that he would not have been fired but for his age." Freeman v. Package Machinery Co., 865 F.2d 1331, 1335 (1st Cir. 1988); see also Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981). When, as here, the plaintiff produced no direct evidence of age discrimination, his case is governed in the first instance by the burden-shifting framework of McDonnell Douglas Corp. v. Green, 411 U.S. at 802-05. See Medina-Munoz, 896 F.2d at 8; Loeb v. Textron, Inc., 600 F.2d 1003, 1010 (1st Cir. 1979). It is the judge's province to determine if the respective parties have adduced sufficient evidence to satisfy these burdens. Dea v. Look, 810 F.2d 12, 16 (1st Cir. 1987).

The framework is by now a familiar one.

The plaintiff must initially make a prima facie showing of discrimination. McDonnell Douglas, 411 U.S. at 802; Medina-Munoz, 896 F.2d at 8. The burden of making out a prima facie case is "not onerous." Burdine, 450 U.S. at 253; see also Villanueva v. Wellesley College, 930 F.2d 124, 127 (1st Cir.) (the prima facie showing is "quite ease to meet"), cert. denied, 112 S.Ct. 181 (1991). In an age of discrimination case, this requires a demonstration that (i) the plaintiff was over the age of forty, (ii) his work was sufficient to meet his employer's legitimate expectations, (iii) his employer took an adverse action against him, and (iv) the employer sought a replacement with roughly equivalent job qualifications, thus revealing a continued need for the same services and

skills. See, e.g., Hebert v. Mohawk Rubber Co., 872 F.2d 1104, 1110 (1st Cir. 1989); Menzel v. Western Auto Supply Co., 848 F.2d 327, 328 (1st Cir. 1988). This showing gives rise to an inference that the employer discriminated due to the plaintiff's advanced years. See Freeman, 865 F.2d at 1335.

The next burden - articulating a legitimate, nondiscriminatory reason for the adverse employment decision - belongs to the defendant. See Hebert, 872 F.2d at 1111; Menzel, 848 F.2d at 328. This entails only a burden of production, not a burden of persuasion; the task of proving discrimination remains the claimant's at all times. See Burdine, 450 U.S. at 253; Medina-Munoz, 896 F.2d at 9. Once such a reason emerges, the inference raised by the prima facie case dissolves,

Medina-Munoz, 896 F.2d at 9; Freeman, 865 F.2d at 1336, and the last transfer of burdens occurs.

At the final stage, the plaintiff is required to show, unassisted by the original inference of discrimination, that the employer's proffered reason is actually a pretext for discrimination of the type alleged.[5] See Furnco Constr.

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5 Some opinions have linked a plaintiff's burden of demonstrating pretext to the strength of the employer's proffered reason. See, e.g., Loeb, 600 F.2d at 1012 n.6. ("The reasonableness of the employer's reasons may of course be probative of whether they are pretexts. The more idiosyncratic or questionable the employer's reason, the easier it will be to expose it as pretext."); see also Medina-Munoz, 896 F.2d at 10; Menzel, 848 F.2d at 329-30. Plotting the interrelationship between the plaintiff's burden and the employer's reason in such a manner appears both to square with reality and to fit well with the Court's observation that the McDonnell Douglas model "was never intended to be rigid, mechanized, or ritualistic." Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978). After all, if the employer

Corp. v. Waters, 438 U.S. 567, 578 (1978); McDonnell Douglas, 411 U.S. at 805; Villanueva, 930 F.2d at 127-28; Medina-Munoz, 896 F.2d at 9; Dea, 810 F.2d at 15-16. In assessing pretext, a court's "focus must be on the perception of the decisionmaker," that is, whether the employer believed its stated reason to be credible. Gray v. New England Tel. and Tel. Co., 792 F.2d 251, 256 (1st Cir. 1986). It is not enough for a plaintiff merely to impugn the veracity of the employer's justification; he must

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offers a shaky, hard-to-swallow reason for its actions, logic counsels that the plaintiff's follow-on burden should become correspondingly lighter. On the other hand, at the summary judgment stage there remains some unresolved tension between the sliding scale approach and the principles upon which Rule 56 depends. Having noted this dilemma, we may eschew it here, for Mesnick's case cannot withstand the force of the defendant's motion whether or not a sliding scale is used.

"elucidate specific facts which would enable a jury to find that the reason given is not only a sham, but a sham intended to cover up the employer's real motive: age discrimination." Medina-Munoz, 896 F.2d at 9; see also Furnco, 438 U.S. at 578; Villanueva, 930 F.2d at 127-28.

Because the resultant burden can be carried without direct proof of discrimination, requiring the plaintiff to show that the employer's reason is a pretext for age discrimination comports with the principle that a plaintiff should not be required to produce "smoking-gun" evidence before prevailing in a discrimination suit. There are many veins of circumstantial evidence that may be mined by a plaintiff to this end. These include, but are by no means

limited to, statistical evidence showing disparate treatment by the employer of members of the protected class, see, e.g., Olivera v. Nestle Puerto Rico, Inc., 922 F.2d 43, 49 (1st CIr. 1990), comments by decisionmakers which denigrate those over forty, see, e.g., Siegel v. Alpha Wire Corp., 894 F.2d 50, 55 (3rd Cir.), cert. denied, 110 S.Ct. 2588 (1990), the incidence of differential treatment in the workplace, see, e.g., McDonnell Douglas, 411 U.S. at 804-05, and the deployment of younger replacements, see, e.g., Hebert, 872 F.2d at 1115. Above all, courts will look at evidence of discrimination not in splendid isolation, but as a part of an aggregate package of proof offered by the plaintiff. Olivera, 922 F.2d at 50.

If is important to remain mindful that,

when summary judgment record is complete, the jurisprudence of Rule 56 takes hold and the McDonnell Douglas burden-shifting framework must comport with the rule. See MacDonald v. Eastern Wyo. Mental Health Ctr., 941 F.2d 1115, 1122-23 (10th Cir. 1991) (Seth, J., writing separately). If the plaintiff has failed to limn a prima facie case, the inference of discrimination never arises, and the employer's motion for summary judgment will be granted. See, e.g., Menard v. First Sec. Servs. Corp., 848 F.2d 281, 285-87 (1st Cir. 1988). If the plaintiff has made out his prima facie case, and the employer has not offered a legitimate, nondiscriminatory reason to justify the adverse employment action, then the inference of discrimination created by the prima facie case persists,

and the employer's attempt to secure summary judgment should be rebuffed. See, e.g., Burdine, 450 U.S. at 254; Furnco, 438 U.S. at 577. When the struggle has progressed to the third and final phase of burden-shifting, however, then the McDonnell Douglas framework falls by the wayside. Because this phenomenon is much misunderstood, we pause briefly to explicate it.

It is settled that the presumption arising from a discrimination plaintiff's prima facie case vanishes once the employer has articulated a legitimate, nondiscriminatory reason for dismissing the employee. See Medina-Munoz, 896 F.ed at 9; Freeman, 865 F.2d at 1336; Menard, 848 F.2d at 287. At that juncture, the ultimate question becomes whether, on all the evidence of record, a rational

factfinder could conclude that age was a determining factor in the employer's decision. See United States Postal Serv. Bd. of Govs. v. Aikens, 460 U.S. 711, 716 (1983). That is to say, so long as the employer's proffered reason is facially adequate to constitute a legitimate, nondiscriminatory justification for the employer's actions, the trial court's focus in deciding a Rule 56 motion must be on the ultimate question, not on the artificial striations of the burden-shifting framework.[6]

Put another way, under conventional summary judgment practice, a plaintiff must establish at least a genuine issue

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6 Although, in this posture, the burden-shifting framework itself becomes inconsequential, the court must still examine the evidence that the parties adduced in proceeding under the framework.

of material fact on every element essential to his case in chief. Celotex, 477 U.S. at 323. Hence, in a case where the two steps of the McDonnell Douglas pavane have been satisfactorily choreographed, a plaintiff must offer some minimally sufficient evidence, direct or indirect, both of pretext and of the employer's discriminatory animus to prevail in the face of a properly drawn Rule 56 motion. Once the burden-shifting framework has run its course, we think that courts should not unduly complicate matters, whether on summary judgment or on motion for directed verdict at trial's end, "by applying legal rules which were devised to govern 'the basic allocation of burdens and order of proof' in deciding this ultimate question." Aikens, 460 U.S. at 716

(quoting Burdine, 450 U.S. at 252) (citation omitted.)

It is against this backdrop that we move to the particulars of Mesnick's discrimination claim. We realize, as we do so, that the quantum of evidence a plaintiff must produce to survive a directed verdict at trial, and thus, the quantum necessary to survive a pretrial Rule 56 motion, is not susceptible to formulaic quantification. The determination must be made case by case, in light of the principles undergirding summary judgment, the evidentiary record, and the substantive rules of law applicable in a given instance.

B.

The district court ruled that there was no significantly probative evidence that

GE's stated reason for its action- Mesnick's insubordination and inimicality - masked a discriminatory animus based on Mesnick's age.[7] The plaintiff concedes that this reason, if authentic, would legitimize an adverse employment decision. But, he claims to have adduced proof of both pretext and discriminatory animus, thereby sidestepping summary judgment. We agree in part, for Mesnick created a triable issue of fact anent pretext vel non. We disagree, however, as to the second half of the equation. Like the court below, we are unable to find in this record enough evidence of age discrimination to withstand brevis

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7 The district court also questioned whether Mesnick had made out a prima facie case on the discriminatory discharge claim. We assume, for argument's sake, that the plaintiff successfully overcame this obstacle.

disposition. That ends the matter. The "ADEA does not stop a company from discharging an employee for any reason (fair or unfair) or for no reason, so long as the decision to fire does not stem from the person's age." Freeman, 865 F.2d 1341. Courts may not sit as super personnel departments, assessing the merits - or even the rationality - of employers' nondiscriminatory business decisions. See Furnco, 438 U.S. at 578; Petitti v. New England Tel. & Tel. Co., 909 F.2d 28, 31 (1st Cir. 1990); Loeb, 600 F.2d at 1012 n.6.

To be sure, Mesnick flooded the nisi prius roll with plethoric evidence designed to illustrate his professional competence and ability to work well with others - but the vast majority of Mesnick's evidence related to pretext vel

non. Regardless of its bulk, this evidence had nothing at all to do with age or with the employer's true motives. On that score, Mesnick offered only two isolated tidbits purporting to indicate GE's discriminatory animus. Viewed singly or in combination, these fragments would not allow a rational jury to find that GE had a hidden, age-oriented agenda.

The first piece of evidence comprises a comment attributed to Georgiou, on the occasion of Sherman's departure, that he was "sad to lose the youth of the work force." Words of praise for youth-Sherman was in his thirties - do not, by themselves, indicate a bias against more mature workers.[8] See, e.g., Shager v.

8 The converse, of course, has different ramifications. There are many situations where a supervisor's slur

Upjohn Co., 913 F.2d 398, 400-02 (7th Cir. 1990) (supervisor's mention that "[i]t is refreshing to work with a young man with ... a wonderful outlook on life and on his job" was not probative of age discrimination); Merrick v. Farmers Ins. Group, 892 F.2d 1434, 1438-39 (9th Cir. 1990) (summary judgment for employer affirmed in ADEA case despite supervisor's comment that he chose plaintiff's replacement because the latter was "a bright, intelligent, knowledgeable young man"); see also Medina-Munoz, 913 F.2d at 402-03.

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about persons over forty may well signal a discriminatory motive underlying an employer's decisions. See, e.g., Olivera, 922 F.2d at 49 (employer mentioned that poor performance by some of plaintiff's subordinates was due to age); Siegel, 894 F.2d at 55 (supervisor commented that "old dogs won't hunt"); Hebert, 872 F.2d at 1115 (employer remarked that "it's time we older guys turned over the daily reins to some other group").

Georgiou's remark to Sherman cannot plausibly support an inference of age discrimination in GE's dealings with Mesnick.

The second piece of evidence upon which Mesnick fastens is no more rugged. He points to the fact that, when an outside search firm retained by GE reported on potential recruits for the manager's position, it not only furnished the company a roster of candidates, but also listed their names.[9] Yet, despite ample time for discovery, Mesnick offered no evidence that GE directed the search firm to memorialize applicants' ages or that the company had reason to suspect that the search firm's report, when submitted,

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9 We note in passing that, under applicable EEOC guidelines, a request for an applicant's age "is not, itself, a violation of the [ADEA]." 29 C.F.R. s. 1625.5 (1990).

would contain such data. Whatever the search firm's reason for collecting ages, the intentions of a third party may not be attributed to an employer without some rational basis for attribution. See La Montagne v. American Convenience Prods., Inc., 750 F.2d 1405, 1412 (7th Cir. 1984); cf. Medina-Munoz, 896 F.2d at 10 (the biases of one other than the decisionmaker are not ordinarily probative in a discrimination suit). Since there is no basis for attribution here - no evidence, say, that GE requested, or was desirous of receiving, age-related information - the fact that the search firm supplied the applicants' ages does not increase or decrease the likelihood that GE discriminated against the plaintiff because of his years.

To sum up, the district court was under

no obligation to draw unreasonably speculative inferences in mulling whether the plaintiff fulfilled his burden of adducing "specific facts showing that there is a genuine issue for trial." Anderson, 477 U.S. at 256. Inasmuch as the summary judgment record contained no evidence from which a rational jury could infer, without the most tenuous insinuation, that GE's legitimate, nondiscriminatory reason for cashiering Mesnick was actually a pretext for age discrimination, the district court did not err in defenestrating the plaintiff's claim. See Celotex, 477 U.S. at 323 ("[A] complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.")

IV. THE RETALIATION CLAIM

Our journey through the record is still incomplete. In addition to claiming that GE discriminated against him by reason of his age, the plaintiff also alleged that GE retaliated against him because he dared to exercise ADEA-related rights. We turn, then to the question whether Mesnick presented sufficient evidence to evade summary judgment on his retaliation claim.[10]

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10 The plaintiff asserts nearly two years' worth of grievances as predicates for his retaliation claim. He contends that GE manifested its retaliatory animus by not deputizing him to attend an out-of-town professional conclave, not inviting him to certain staff meetings, refusing to give him information concerning the company's policy on posting job openings, failing to afford him prompt access to documents pertaining to an investigation of pricing practices, to discuss work-related matters with him, denying him a salary increase, moving his office, filing a 20.10 concern, terminating him, and, as a final indignity, using false representations to

A.

The ADEA provides in pertinent part:

> It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment ... because such individual ... has opposed any practice made unlawful by this section, or because such individual ... has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter.

29 U.S.C. s. 623(d). Absent direct evidence, the McDonnell Douglas burden-shifting framework remains the option of choice in retaliation cases, albeit with slight modifications. Under the applicable model, the plaintiff must make

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gain possession of documents in his office. Despite this asseverational array, we think the retaliation claim can best be taken as a whole to determine its viability. In all its permutations, the claim falters because of Mesnick's failure to carry his burden of adducing evidence adequate to create a triable issue on GE's retaliatory animus. See text infra.

a prima facie showing that (i) he engaged in ADEA-protected conduct, (ii) he was thereafter subjected to an adverse employment action, and (iii) a causal connection existed between the protected conduct and the adverse claim. See Connell v. Bank of Boston, 924 F.2d 1169, 1179 (1st Cir.), cert. denied, 111 S.Ct. 2828 (1991);Petitti, 909 F.2d at 33. The fact that a plaintiff eventually proves unable to establish that the employer violated the ADEA in the first instance is not fatal to his prima facie case of retaliation. It is enough that the plaintiff had a reasonable, good-faith belief that a violation occurred; that he acted on it; that the employer knew of the plaintiff's conduct; and that the employer lashed out in consequence of it. See Petitti, 909 F.ed at 33; Manoharan v.

Columbia Univ. College of Physicians & Surgeons, 842 F. 2d 590, 593 (2nd Cir. 1988).

Once a prima facie case is delineated, the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for its employment decisions. See McNairn v. Sullivan, 929 F.2d 974, 980 (4th Cir. 1991); Petitti, 909 F.2d at 34. If this is accomplished, the ultimate burden falls on the plaintiff to show that the employer's proffered reason is a pretext masking retaliation for the employee's opposition to a practice case into doubt by the ADEA. See Dominic v. Consolidated Edison Co., 822 F.2d 1249, 1254 (2nd Cir. 1987); see also EEOC v. Hacienda Hotel, 881 F.2d 1504, 1514 (9th Cir. 1989) (Title VII retaliation case); Williams v.

Cerberonics, Inc., 871 F.2d 452, 457 (4th Cir. 1989) (same). As in the discrimination context proper, courts confronted by summary judgment motions must at this point focus on the ultimate question, scrapping the burden-shifting framework in favor of considering the evidence as a whole. See supra pp. 12-14; see also Cerberonics, 871 F.2d at 458 (in determining whether it is appropriate to take a retaliation case from the jury, a reviewing court's focus must be on "the evidence as a whole"). Thus, the critical inquiry becomes whether the aggregate evidence of pretext and retaliatory animus suffices to make out a jury question.

There are many sources of circumstantial evidence that, theoretically, can demonstrate

retaliation in a way sufficient to leap the summary judgment or directed verdict hurdles. These include, but are not limited to, evidence of differential treatment in the workplace, see, e.g., Sumner v. United States Postal Serv., 899 F.2d 203, 210 (2nd Cir. 1990); Dominic, 822 F.2d at 1254-55, statistical evidence showing disparate treatment, see, e.g., Rowlett v. Anheuser-Busch, Inc., 832 F.2d 194, 202 (1st Cir. 1987); Sumner, 899 F.2d at 209, and comments by the employer which intimate a retaliatory mindset. Whatever the sources of his proof, a plaintiff, in order to survive judgment as a matter of law, must present evidence from which a reasonable jury could infer that the employer retaliated against him for engaging in ADEA-protected activity. Petitti, 909 F.2d at 33; Cerberonics, 871

F.2d at 458.

B.

If we assume, arguendo, that the plaintiff established a prima facie case of retaliation, then, given the defendant's forceful articulation of a legitimate, nondiscriminatory reason justifying its action, see supra Part III(B), the case boils down to what we have termed the ultimate question: did Mesnick present sufficient evidence that GE's stated reason was a pretext for retaliation? We think the answer to this query is in the negative.

Here, the very chronology of the case militates against a finding that Mesnick's evidence was sufficiently robust to thwart brevis disposition. His first complaint of age discrimination was

made informally in a memorandum he sent to Capodici on April 23, 1987. Almost nine months later, he filed charges with the EEOC. Not only is this a long gestation period, during which Mesnick's employment remained substantially intact, but GE also offered evidence of insubordination and inimicality that antedated either of these events. Moreover, after Mesnick first enlisted the EEOC, he remained in GE's employ for another nine month's, more or less, before he was finally fired (and then, only after committing a particularly provocative act in outright defiance of an unmistakably aposematic admonition). We think the sequence of events in this case suggests the absence of a causal connection between the statutorily protected conduct and the adverse

employment action, not the converse. Cf., e.g., Olivera v. Digital Equipment Corp., 846 F.2d 103, 110-11 (1st Cir. 1988) (long period of delay between initial EEOC complaint and ultimate discharge negates inference of retaliation).

In addition to this lack of temporal coincidence, we can find no other competent evidence of retaliation. Mesnick's proof related exclusively to whether business decisions made by the company in its efforts to deal with an employee it perceived as insubordinate were, or were not, plausible. He tendered nothing, direct or circumstantial, suggesting a retaliatory animus. To the contrary, the record, read as a whole, is more consistent with an employer's longstanding desire to

improve an employee's behavior than with some sort of vengeful preoccupation. We can, after all, safely conclude, on the basis of the undisputed facts, that GE for many months endured conduct on Mesnick's part which was much more antagonistic and disruptive than his eventual resort to the EEOC.

To be sure, GE knew, at the time Mesnick was dismissed, that he was pursuing an age discrimination claim. But, that kind of knowledge on an employer's part, without more, cannot itself be sufficient to take a retaliation case to the jury. Were the rule otherwise, then a disgruntled employee, no matter how poor his performance or how contemptuous his attitude toward his supervisors, could effectively inhibit a well-deserved

discharge by merely filing, or threatening to file, a discrimination complaint. We agree with the Eighth Circuit that, while statutes such as the ADEA bar retaliation for exercising rights guaranteed by law, the do "not clothe the complainant with immunity for past and present inadequacies, unsatisfactory performance, and uncivil conduct in dealing with subordinates and with his peers." Jackson v. St. Joseph State Hosp., 840 F.2d 1387, 1391 (8th Cir.) (Title VII case), cert. denied, 488 U.S. 892 (1988). In the absence of proof sufficient to create a jury issue regarding retaliation, courts should not use cases involving unsupported reprisal claims to police the wisdom, fairness, or even the rationality of an employer's business judgments.

Because we do not believe a reasonable jury could find in the plaintiff's favor on the issue of retaliatory animus, summary judgment was proper.

V. CONCLUSION

We need go no further. The plaintiff's failure to adduce evidence supporting an inference of discriminatory or retaliatory motive was, as the district court perspicaciously discerned, fatal to his case in its several permutations.[11]

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11 As framed, the plaintiff's complaint contained parallel claims under federal law and the Massachusetts antidiscrimination statute, Mass. Gen. L. ch. 151B, s. 4. In opposing summary judgment, however, the plaintiff relied exclusively on federal precedents. The district court granted summary judgment on all claims, reasoning that, insofar as the state-law counts were concerned, Massachusetts would employ a standard similar to that embodied in the ADEA. In his reply brief on appeal, the plaintiff for the first time attempts to argue that Massachusetts law is more favorably

The defendant's motion for summary judgment was, therefore, appropriately granted.

Affirmed.

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disposed to his claims. We do not consider the legal merits of this argument because we find the point to have been waived. See Sandstrom v. Chemlawn Corp., 904 F.2d 83, 87 (1st Cir. 1990) (an argument which i "coherently pulled together for the first time in [a party's] reply brief in [the court of appeal's] is procedurally defaulted" and will not be considered); see also McCoy v. Massachusetts Inst. of Technology, __ F.2d __, (1st Cir. 1991) [No. 91-1318, slip op. at 19] ("It is hornbook law that theories not raised squarely in the district court cannot be surfaced for the first time on appeal." (collecting cases).

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 89-1453-Z

SAMUEL MESNICK

vs.

GENERAL ELECTRIC COMPANY

MEMORANDUM OF DECISION

ZOBEL, D.J.

Plaintiff Samuel Mesnick charges defendant General Electric Company ("GE") with violating the Age Discrimination Act (ADEA), 29 U.S.C. section 621 et seq. (1988), and Mass. Gen. L. ch. 151B (1986), by cutting salary increases he expected, by preventing him from applying for a position which was eventually filled by a younger individual, by demoting and replacing him with the same

younger individual, and by harassing and eventually terminating him. He also claims that the harassment and termination constituted retaliation against him for filing charges with the Equal Employment Opportunity Commission (EEOC). Defendant now moves for summary judgment pursuant to Fed. R. Civ. P. 56, arguing that plaintiff has not established a prima facie case of age discrimination, nor has he offered any evidence to rebut its assertion that all of its actions were taken for legitimate business reasons.

STATEMENT OF MATERIAL UNDISPUTED FACTS

After eleven years of experience with the United States Air Force in the area of government contracting and procurement, plaintiff was hired as a

Senior Contracts Administrator, Grade 51, in June 1974, by RCA Automated Systems Division, which was located in Burlington, Massachusetts. He was then 51 years old (date of birth 11-30-22). RCA promoted him to Manager, Contracts, Grade 52, in June 1977, and to Manager, Contracts, Grade 53, in June 1982. In this last position, he was the overall Contracts Manager, and supervised up to thirteen people, three of whom were themselves managers. Defendant acquired RCA in 1986 and began to replace RCA managers with its own employees, but plaintiff continued as the overall Contracts Manger until December 1987.

As overall Contracts Manager, plaintiff reported to Kenneth Pressman, RCA's Director of Finance, from August 1982 until January 1987. Pressman testified

that, as of January 1987, he had a very high opinion of plaintiff's "technical skills," "knowledge of his job," and "knowledge of the government acquisition process," but that he "would probably not have been as complementary in terms of his...'behavior.'" He stated that he reprimanded plaintiff on a few occasions for incidents involving inappropriate behavior toward other employees, but that he agreed with plaintiff's handling of the department.

Gene Stockton, who was Pressman's immediate supervisor and the General Manger of the Burlington plant, and James Kupec, the Director of Employee Relations, reported receiving a number of complaints about plaintiff's behavior commencing in 1985 after plaintiff returned from a five month medical leave.

The complaints came from contract administrators, customers, and other employees, and included allegations of difficulty in interacting and communicating with female employees, presenting customers with a poor image, engaging in inappropriate behavior in contract negotiations, tardiness, drinking at lunch, and acting in more than one instance in a crude and offensive manner toward black and female employees. The complaints were serious enough to spur Stockton and Kupec to tell Pressman in late 1985 and early 1986 that plaintiff needed to improve his work conduct and management practices if he was to retain his position as overall Contracts Manager and avoid termination. RCA management notified plaintiff of these complaints; he disputed (and

continues to dispute) the validity of most of them. He acknowledges drinking at lunch, however, along with making a questionable remark to a black female employee, for which he later apologized.

Pressman, Stockton, and Kupec all had discussions concerning plaintiff's job performance with Achilles Georgiou[1], whom defendant installed as the new Director of Finance in early January 1987. Based on these discussions and his own observations of plaintiff's performance, Georgiou, on March 7, 1987, gave plaintiff a performance evaluation which, although complimentary of his technical abilities, states that he needed to

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[1] Georgiou had been director of finance at GE's Owensboro, Kentucky, plant for three years. His responsibilities regarding contract administration in that position centered on furnishing cost and pricing data.

"become more of a team player," to "seek involvement throughout the solicitation and proposal [process]," and to focus on "administrative and working environment details." In closing, the evaluation stated that plaintiff would "not achieve his long range career interests" in the Automated Systems Division because of the aforementioned shortcomings, and suggests that he should "pursue a private career of a federal procurement consultant." Plaintiff signed the evaluation, but noted on it that he disagreed with it.

At approximately the same time, he learned that defendant had halved the $4000 merit raise he had been expecting since December 1986, when RCA staff was still in charge of his division. Plaintiff stated that RCA should have given him this raise in November or

December of 1986, but that Pressman had forgotten to submit it. There is no evidence regarding whether such raises were routine or whether defendant had ever decided to give the full amount to him or any of the other RCA employees who remained after the takeover.

Within a day or two of the meeting at which plaintiff received this evaluation from Georgiou, he submitted a lengthy memo to Georgiou criticizing the latter's evaluation and decision regarding the merit increase. At the end of the typewritten portion, plaintiff added a handwritten section stating that he believed Georgiou's evaluation to be based on "prejudiced [sic] and inadequate data and the whole year['s evaluation] was predicated on [Georgiou's] 6 to 7 weeks of observation." He and Georgiou

met in April to discuss the memo and the evaluation, but Georgiou declined to change the evaluation.

It was apparently at this meeting that he and Georgiou also discussed defendant's plan to reorganize the Contracts Department and to staff a new position, Manager ASD Contracts, which would be responsible for the Contracts Departments at both Burlington and another GE facility. Georgiou told plaintiff that he would be eligible to apply for the position, to which plaintiff responded that he would, be interested, depending upon the particulars, and would apply when the job was posted.[2] Plaintiff also noted that he would be applying to "the hanging

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[2] The job was never posted, and it is unclear whether this was required by defendant's policies at the time.

judge," namely Georgiou, alluding to the performance evaluation he had received. Georgiou stated in deposition that he considered plaintiff qualified for the position, but that plaintiff had "some shortcomings in management style that had to be overcome..."

Plaintiff had learned of this new position from one of his subordinates who was resigning: this individual reportedly told plaintiff that Georgiou, hearing of his resignation, had said he was "sad to lose the youth of the work force." (The individual was younger than the plaintiff.) Most of this was related in a memo dated April 23, 1987, from plaintiff to Georgiou's supervisor, Salvatore Capodici[3], which criticized

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[3] Capodici replaced Stockton as the plant's General Manager.

Georgiou for being "extremely crass and unprofessional" in relating future management plans to plaintiff's subordinate before telling plaintiff. On May 12, plaintiff met with Capodici to discuss these matters and suggested that Contracts be removed from the control of Finance, i.e., Georgiou.

In deposition, plaintiff characterized his relationship with Georgiou at this time as "cool but polite"; they worked together relatively little during this period. By fall 1987, however, he characterized their relationship as "almost adversarial." Plaintiff continued to actively petition Capodici to remove the Contracts Division from Georgiou's control, and to adjust his evaluation and raise. He was by this time openly critical of Georgiou's

judgment and knowledge. Shortly after he completed a lengthy but successful contract negotiation in September, he prepared and presented a slide show to Capodici, which detailed his own performance in glowing terms and characterized Georgiou as ignorant and a poor manager. He also prepared some notes for his subordinates in advance of a meeting they were to have with Capodici stating that

> [T]he biggest joke around here is that Contracts is under GE Finance supervision; pitching pennies into a bottomless jar and trying to fill it up. Even if Archie [Georgiou] wasn't here, GE Finance is a different cat than RCA Finance we've always worked for; RCA took "ownership" responsibility. GE is essentially an audit, after the fact function interested only in "orders", "billings" and "payments" without real appreciation of the steps necessary to make these things happen.

Plaintiff's dissatisfaction with defendant led him in concert with another

Contracts employee to develop a three-page "talking paper" or memo, dated November 2, 1987, which suggests that four to eight of the best people in Contracts might leave to work for an employer other than defendant. This document was shown to other Contracts employees as well as to an outside firm.

Matters did not improve when Georgiou informed plaintiff on November 20, 1987, that an outside applicant, 42-year-old Steve Tubbs, had been chosen as Manager ASD Contracts, that plaintiff would have the newly created position of "Manager, Special Projects" and that he would be reporting to Tubbs as of December 14, 1987.[4] In this new

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[4] Defendant first considered internal candidates for this position, but finding none that were viable, turned to an outside placement agency to recruit candidates. Of the outside candidates,

position, plaintiff was no longer supervising any employees and was given a different office. This resulted in a memo from plaintiff to Capodici, dated December 1, 1987, explicitly criticizing Georgiou's integrity, professional honesty, and professional competence.

Tubbs began work at Burlington on December 14, 1987. Later that week, a consultant from Price Waterhouse presented a seminar on defective pricing, a matter of some concern to government contractors, including employees of the Burlington facility. Plaintiff arrived

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Tubbs was neither the youngest nor the oldest. Tubbs had ten years of experience in government contracts management when he was hired, and during those years supervised between ten to sixty contracts professionals. He also had four years experience as a contracts administrator in the private sector, and served sometime as "Head, Procurement Branch" in the U.S. Army prior to that.

toward the end of this presentation, and afterwards approached the consultant to criticize his understanding of defective pricing. On December 23, he sent a memo to "All Contracts" criticizing the presentation as erroneous. Georgiou returned his copy of plaintiff's memo to plaintiff with a handwritten note on it stating he took exception to plaintiff handling of the matter and that plaintiff should have spoken to him first so he could have sought clarification from Price Waterhouse. This occasioned yet another memo from plaintiff, again criticizing the presenter and going on to criticize Georgiou's management style, e.g., for communicating with plaintiff "in the form of a chastising note rather than a discussion."

On January 11, 1988, Georgiou warned

plaintiff about perceived time and attendance problems, including tardiness in the mornings. Plaintiff admitted that he continued to drink at lunch after defendant's takeover of the Burlington facility, and that he drank before a workshop he was to give in March 1987.

On January 21, 1988, plaintiff filed charges with the EEOC and the Massachusetts Commission Against Discrimination, claiming that defendant had discriminated against him due to his age because it had demoted and replaced him with Tubbs. On January 22, he requested a copy of all GE and RCA policies regarding posting of jobs from Anne Turcotte, defendant's manager of employee relations, but defendant failed to deliver them. Defendant learned of

these charges on January 26.[5]

On February 9, 1988, Tubbs asked Plaintiff to update his EMS (a self-evaluation form) within a few days so that he could provide plaintiff with his annual performance evaluation. Plaintiff refused to do so, claiming that Georgiou had used his previous EMS to evaluate him very negatively and eventually to demote him, as he states in a memo to Turcotte. Turcotte informed him in a memo, dated February 25, 1988, that updating his EMS was a company requirement, and that his disagreement with Georgiou would not excuse him from fulfilling it. She also informed him that she did not consider his new position a demotion, apparently because it was at the same level and

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[5] The EEOC eventually determined that GE had not violated the ADEA.

salary as his previous position.

In spite of his supervisors' repeated requests for plaintiff to complete his EMS, he never did so. He did, however, send a series of memos to his superiors over the next four months, alternatively criticizing Tubbs' and Georgiou's management style and requesting a performance evaluation. The series culminated in a June 22, 1988, memo to Capodici requesting a formal evaluation and attributing to Georgiou "professional ignorance" and to Tubbs "less than average professional stature," among a number of other critical comments.

In the interim between January 1988 and the June 22 memo, working relations between plaintiff and his supervisors remained strained. In addition to plaintiff's memos, Georgiou advised Tubbs

to send "anyone but Sam" to represent the Contracts Department at a meeting in Philadelphia, and Tubbs failed to invite plaintiff to staff meetings and advised certain Contracts employees not to talk to him about contract matters.

Plaintiff received his performance evaluation on July 19, 1988. It identifies his "extensive contractual technical experience" as a strength, but states that his contract skills "are negated by his lack of interpersonal skills/confrontational attitude, contentiousness, disregard for management direction and policy, and inability/unwillingness to fulfill managerial grade expectations. Overal [sic] performance is rated marginally acceptable, and would be rated unsatisfactory were it not for specific

accomplishments noted herein." As a result, plaintiff did not receive any merit increase in his salary. On the same day, he received a memo from Capodici characterizing plaintiff's June 22 memo as "gross insubordination" for its "personal attacks" on Tubbs, and explicitly warning him that his "insubordinate behavior is totally unacceptable and that any further incident is cause for immediate dismissal." On August 5, plaintiff responded by filing a 20.10 report,[6] charging Tubbs with "Management dereliction" for not pointing out his

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[6] A "20.10" is a GE policy under which employees may submit a report of activities by other employees which they believe may be defrauding the government.

infractions[7] to him "rather than deliberately attempting to entrap [him]," and suggesting that Tubbs be terminated. Defendant investigated the complaint and determined that Tubbs had acted appropriately.

The proverbial last straw came on September 7, 1988, when plaintiff handed a twelve page memo to both Tubbs and Georgiou. This memo consisted primarily of attacks on various comments made in his performance evaluation, charges that Tubbs and Capodici were retaliating against plaintiff for filing a charge with the EEOC, and an implicit renewal of his remarks about Tubbs in the June 22 memo to Capodici. Plaintiff was

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[7] Tubbs had submitted a "20.10 Concern" on March 28, 1988, because plaintiff was absent without noting this on his time card.

terminated on September 16 for insubordination.[8]

DISCUSSION

I. Age Discrimination Claim

In an employment discrimination case, "[t]he plaintiff carries the initial burden of establishing a prima facie case." Olivera v. Nestle Puerto Rico. Inc., 922 F.2d 43, 46 (1st Cir. 1990). The elements of a prima facie case are stated somewhat differently depending on the nature of the challenged action, but however it is characterized, it "serves an important function in the litigation: it eliminates the most common

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[8] He thereafter filed another complaint with the EEOC, charging that defendant had retaliated against him for filing his first EEOC complaint; the EEOC once again determined that defendant had not violated the ADEA.

nondiscriminatory reasons" for the employer's action. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981). If the plaintiff establishes a prima facie case, the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for its action, for example, the performance problems which GE has alleged here.[9] If the defendant does so, the "plaintiff has the burden not only of proving that the articulated reasons of the employer were pretextual but also of adducing

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[9] With regard to such articulated reasons, the First Circuit has determined that "[o]ur role is not to second guess the business decisions of an employer, imposing our subjective judgments of which person would best fulfill the responsibilities of a certain job." Rossy v. Roche Prods., Inc., 880 F.2d 621, 625 (1st Cir. 1989).

additional evidence that the articulated reasons were a pretext for age discrimination" if he is to avoid summary judgment. Olivera, 922 F.2d at 48.

For purposes of discussion, I will begin by assuming that plaintiff has met his burden of establishing a prima facie case and showing that defendant's preferred reasons are pretextual. After considering the state of the record regarding age discrimination as such, I will return to examine whether, with the undisputed facts, plaintiff can meet his burden on those issues.

The central issue in an ADEA action is whether or not age discrimination motivated the employer's actions, Herbert v. Mohawk Rubber Co., 872 F.2d 1104, 1110 (1st Cir. 1989), and it is precisely on this point that plaintiff's

case falters. Plaintiff alleges that defendant's denying him the full expected salary increase in March 1987, "preventing" him from applying for the new managerial position, replacing him with Tubbs and demoting him, harassing him in a number of ways in 1988, not giving him a merit increase in July 1988, and terminating him, were all actions motivated by age based animus, yet he has provided no evidence for this. The complaint alleges that "Mr. Georgiou also discriminated against other elderly managers, causing their early termination from GE," but plaintiff has not offered a shred of evidence to support this.

The only evidence plaintiff has submitted which relates to age in any way is the comment Georgiou allegedly made to a resigning employee about being sorry

"to lose the youth of the organization,"[10] and the fact that defendant knew the ages of those applying for Tubbs eventual position. The latter is not per se violative of the ADEA, see 29 C.F.R. s. 1625.5 (1990), nor can "stray remarks in the work place ... justify requiring the employer to prove that its hiring or promotion decisions are based on legitimate criteria." Price Waterhouse v. Hopkins, 490 U.S. 228, 277 (1989) (O'Connor, J., concurring).

Summary judgment of the age discrimination claim is warranted on this basis alone.

> [T]he plain language of Rule 56(c) mandates the entry of summary judgment ... against a party who fails to make a

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[10] This would be inadmissible as hearsay at trial, if offered through plaintiff's, rather than the unnamed individual's testimony.

> showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be no genuine issue as to any material fact, since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.

Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). Plaintiff's case is flawed in other respects, however.

a. Merit Increase in Salary.

Plaintiff apparently argues that because Georgiou lacked knowledge of his job and evaluated his work on the basis of only a few weeks observation, his negative evaluation and the corresponding cut in the expected pay increase must be due to age discrimination.

This is specious. Even if Georgiou was professionally ignorant as plaintiff

claims, and acted solely on the basis of a few weeks observation, this does not show that age discrimination was involved in the decision. Ignorance and incompatibility alone do not rise to the level of age discrimination. Furthermore, Georgiou did receive and act upon information in addition to his own observations, information from plaintiff's previous managers which indicated that they had mixed feelings about plaintiff's performance as a manager. Finally, plaintiff has adduced no evidence showing that defendant had promised to pay the same merit raises RCA may have promised, that other carryover employees received the merit raises they expected from RCA, or even that defendant awarded merit raises routinely regardless of performance. Without such evidence,

this does not constitute the type of adverse employment decision covered by the ADEA.

b. Failure to Promote.

Plaintiff argues that Georgiou prevented him from applying for the Tubbs' eventual position by failing to post a job notice after plaintiff had said he would apply when the job was posted. Leaving aside the fact that it is uncertain what defendant's policies regarding posting of job notices as during the transitional period at Burlington, and assuming that he made clear his intention to apply, plaintiff still does not meet the requirements of a failure to promote case.

In a failure to promote case, "[t]he plaintiff must prove by a preponderance

of the evidence that she applied for an available position for which she was qualified, but was rejected under circumstances which give rise to an inference of unlawful discrimination." Burdine, 450 U.S. at 253. It is undisputed that plaintiff was well qualified with respect to the technical aspects of his position, but that there had been a number of complaints about his behavior and conduct, both before and after defendant's takeover of the Burlington facility. Plaintiff's performance rating dropped from a '1' in June 1984 to a '3' ("satisfactory") by December 1985 and finally to a '4' in March 1987 on a scale of one to five. After the March evaluation, plaintiff repeatedly criticized his manager, both to top management and to lower level

employees, in an attempt to undermine his authority and position. Both RCA and GE management discussed these complaints and problems with him, but rather than showing any interest in improving his performance, he intensified his campaign even to the point of encouraging people to consider leaving the GE Contracts Group. In view of all this, plaintiff has failed to raise an issue of fact that he was qualified for a position of increased responsibility such as Tubbs'.

c. Demotion.

For essentially the same reasons, plaintiff has failed to establish that his demotion to "Manager, Special Projects" was unjustified.[11] Borrowing

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[11] Defendant disputes that this change was a demotion since plaintiff's grade level and salary did not change,

from a First Circuit termination case, Loeb v. Textron, Inc., 600 F.2d 1003 (1st Cir. 1979), both the Fourth and the Seventh Circuits have held that in a demotion case, the plaintiff is required to show as part of his prima facie case that he was meeting the employer's legitimate expectations. See Golomb v. Prudential Ins. Co., 688 F.2d 547 (7th Cir. 1982); Lovelace v. Sherwin-Williams Co., 681 F.2d 230, 239 (4th Cir. 1982). An employee who openly criticizes his supervisor as ignorant and is encouraging subordinates to leave for other companies does not meet his employer's legitimate expectations.

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but it might arguably be considered such since he was no longer in a supervisory position.

d. 1988 Denial of Merit Increase and Discharge.

A recent First Circuit case held that one of the elements of a prima facie discharge case is whether the plaintiff "was qualified for the position he held and doing his job well enough to rule out the possibility that his discharge was for inadequate job performance. . . ." Olivera, 922 F.2d at 45. Given the continuing stream of critical memos in the face of explicit warnings and the refusal to perform tasks requested of him, plaintiff has simply not ruled this possibility out.

II. Retaliation Claim

"In order to establish a prima facie case of retaliation, plaintiff must show that: he engaged in conduct protected by the act; he was subjected to an adverse

employment action at the time or after the protected conduct occurred; and there was a causal link between the protected conduct and the adverse employment action." Connell v. Bank of Boston, 924 F.2d 1169, 1179 (1st Cir. 1991). If plaintiff can establish a prima facie case of retaliation, the defendant must assert a legitimate, nonretaliatory reason for its action, which the plaintiff must then demonstrate is a pretext, providing additional evidence that the defendant's true motive was retaliatory. See 2 H. Eglit, Age Discrimination s. 16.24 (1981) ("The general order of proof for disparate treatment cases ... applies to cases of retaliation.").

Plaintiff offers as evidence of retaliation the following: Georgiou

advising Tubbs to send "anyone but Sam" to represent the Contracts Department at an out of town meeting; Tubbs' failure to invite him to staff meetings; defendant giving him access to documents pertaining to a criminal defective price investigation only after inquiry by his lawyer; a delayed performance appraisal; Tubbs telling certain members of the Contracts Department not to talk to him about contract matters; Capodici warning him about insubordination after the June 22 memo; the July 1988 negative evaluation and denial of merit increase; being moved to a different office; having a 20.10 charge filed against him by Tubbs for failing to report absences; and finally, this termination.

Defendant concedes that plaintiff may be able to establish a prima facie case

but, argues that its actions in 1988, culminating in plaintiff's termination, were wholly justified by his continuing poor performance and insubordination. It points to plaintiff's continued drinking at lunch, his refusal to complete his self evaluation, and his memos attacking the integrity inter alia of his managers. Plaintiff characterizes these actions as opposition to his managers' discriminatory practices rather than as insubordination, but the evidence does not support him. Refusal to perform a self evaluation necessary for a performance appraisal (and required of all employees) and then complaining that one has yet to receive the appraisal, attempts to lure employees into quitting to join or become competitors, and repeatedly derogating his supervisors as

ignorant and poor managers to all who would listen (especially subordinates) are not acts that constitute legitimate opposition to discrimination. Plaintiff has offered no evidence to support his assertion that the acts he characterizes as harassment were done for any reason other than the ones defendant offers.

CONCLUSION

For the reasons given, summary judgment for the defendant is granted on all counts.[12]

April 15, 1991
DATE

Rya W. Zobel /s/
DISTRICT JUDGE

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[12] Because Mass. Gen. L. ch. 151B, s. 4, has a burden-shifting paradigm much like that of federal law, see McKenzie v. Brigham & Women's Hosp., 405 Mass. 432, 541 N.E. 2d 325 (1989); Gregory v. Raytheon Serv. Co., 27 Mass. App. Ct. 1170, 540 N.E. 2d 694, review denied, 405 Mass. 1205, 545 N.E. 2d 43 (1989), summary judgment is appropriate on the state law counts as well.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 89-1453-Z

SAMUEL MESNICK

vs.

GENERAL ELECTRIC COMPANY

JUDGMENT

ZOBEL, D.J.

Defendant's motion for summary judgment having been granted on all counts, it is ORDERED that judgment be and it is hereby entered for defendant in accordance with the Memorandum of Decision dated April 15, 1991.

April 15, 1991
DATE

Rya W. Zobel /s/
DISTRICT JUDGE

FILED
MAY 22 1992
OFFICE OF THE CLERK

(2)

No. 91-1528

In the Supreme Court of the United States

OCTOBER TERM, 1991

SAMUEL MESNICK,
PETITIONER,
v.
GENERAL ELECTRIC COMPANY,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court and the court of appeals erred in entering summary judgment against petitioner on his age discrimination claims where, as the court of appeals held, the "record contained no evidence from which a rational jury could infer . . . that [the employer's] legitimate, nondiscriminatory reason for cashiering Mesnick was actually a pretext for age discrimination?"

2. Whether a record replete with instances of insubordinate employee behavior characterized by the court of appeals as "antagonistic" and "disruptive" presents an appropriate occasion for this Court's consideration of differing verbal formulations by and within the several circuit courts of the *McDonnell Douglas-Burdine* scheme in the summary judgment context?

RULE 29.1 LIST

Pursuant to Supreme Court Rule 29.1, respondent General Electric Company provides the following list of subsidiaries (except wholly owned subsidiaries and those subsidiaries whose shares or debt securities are not publicly traded). General Electric Company does not have a parent company.

GECC Financial Corporation

General Electric Capital Corporation
(formerly General Electric Credit Corporation)

General Electric Capital Canada, Inc.

General Electric Credit International, N.V.

General Electric Financial Services, Inc.

Montgomery Ward Credit Corporation

Montgomery Ward & Co., Incorporated
(50% GE owned)

CAMCO, Inc. (Canada) (51% GE owned)

PROCEDURAL STATEMENT

Pursuant to Supreme Court Rule 24.2, respondent General Electric Company relies on the petition for Opinions Below, Jurisdiction and Statutes Involved. No List of Parties is required.

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In the
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OCTOBER TERM, 1991

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GENERAL ELECTRIC COMPANY,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

The respondent General Electric Company respectfully requests that this Court deny the petition for a writ of certiorari, seeking review of the First Circuit's opinion in this case. That opinion is reported at 950 F.2d 816.

STATEMENT OF THE CASE

Contrary to the assertions of petitioner Samuel Mesnick ("Mesnick"), this case involves merely the proper, summary disposition of an age discrimination claim deviod of any eviden-

tiary support. Any purported conflict with decisions of this Court or other courts of appeals is irrelevant, as the same result would have been reached in any circuit. Indeed, this case's only distinguishing feature is the fact that virtually all of the evidence adduced by General Electric in connection with its summary judgment motion was derived either from testimony given or documents authored by Mesnick. Because this plethora of undisputed evidence of insubordinate and offensive behavior amply demonstrates that this fact-specific decision is entirely consistent with this Court's decisions under the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 ("ADEA"), a relatively detailed statement of the case is warranted.

A. *Procedural History.*

On January 21, 1988, Mesnick, while still employed by General Electric, filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") alleging that he was demoted and replaced by a younger person in violation of the ADEA. Later, following the termination of his employment in September, 1988, Mesnick filed a second charge with the EEOC, asserting unlawful retaliation by General Electric. After a full investigation, the EEOC found no probable cause to believe that the challenged actions stemmed from an unlawful, discriminatory or retaliatory motive. In pertinent part, the EEOC Determination Notice stated as follows:

> Examination of the evidence indicates that on many occasions Charging Party made inflammatory comments orally and in writing abouth [sic] the newly hired supervisor concerning his lack of knowledge for the position. Charging Party had been repeatedly warned verbally and in writing to desist this abusive behavior. After approximately seven months of this insubordinate behavior Charging Party was warned that he would be terminated if it continued. Two months later Charging Party was ter-

> minated. Because of Charging Party's abusive conduct and poor performance, Respondent did not feel he was entitled to a merit increase.
>
> Respondent's policy states that terminated employees are not entitled to severance pay. Based on this analysis, I have determined that the evidence obtained during the investigation does not establish a violation of the statute.

(*Mesnick* v. *General Electric Company*, EEOC Charge No. 161890171, Boston Area Office, Determination issued July 28, 1989).

In July, 1989, Mesnick commenced this action in the United States District Court for the District of Massachusetts alleging that General Electric had discriminated against him on account of his age by not selecting him for a promotion and, when he filed a charge of discrimination with the EEOC, had retaliatorily harassed him and terminated his employment. After the close of discovery in this matter, General Electric filed a motion for summary judgment on November 1, 1990. Upon full review of the briefs submitted by both parties, the district court granted General Electric's motion for summary judgment. After oral argument, the First Circuit affirmed the entry of summary judgment in General Electric's favor. Mesnick did not petition for rehearing.

B. *Factual Background*

Mesnick's statement of facts conspicuously omits any reference to his long and undisputed history of performance and behavioral problems both at General Electric and his former employer, Radio Corporation of America ("RCA") (1974-1986), with which General Electric merged in 1986. During his last several years at RCA, Mesnick's behavior led to numerous complaints from customers and other employees. (Pet. App. B-5).[1]

[1] References to "Pet. App. A-__" and "Pet. App. B-__" are to the opinions of the First Circuit and the district court in this case, respectively, reprinted in Petitioner's Appendix.

Mesnick was vulgar; he was insulting; he made racial slurs and sexist remarks; and he was habitually late to work and took long drinking lunches. *Id.* Mesnick's managers spoke with him about these performance issues on several occasions and considered whether he should be removed from his managerial position or terminated outright from RCA. *Id.* RCA finally decided to remove Mesnick from his management position and place him in an individual contributor role without supervisory responsibility. The GE-RCA merger intervened and, as a result, the decision to remove Mesnick was deferred.

After the 1986 merger, General Electric created the Automated Systems Department ("ASD") which combined RCA's automated systems business in Burlington, Massachusetts with General Electric's automated systems business in Huntsville, Alabama. (Pet. App. B-3). As a result of this reorganization, entirely new General Electric management was installed in place of the former RCA management at the Burlington facility at which Mesnick was employed, including his direct supervisor Achilles Georgiou, Manager of Finance (Pet. App. B-3, 6) and Salvatore Capodici, General Manager of ASD, to whom Georgiou reported.

Almost immediately following the installation of these new General Electric managers, Mesnick made clear his lack of respect and even disdain for the new corporate culture. He ridiculed the way in which the contracts function was positioned within General Electric's structure and made clear his dissatisfaction with any deviation from the RCA mores. (Pet. App. B-12). As his behavior during ensuing months revealed, this antagonism toward General Electric's management style was profound.

Without any prior knowledge of such antagonism, Georgiou, following his January, 1987 arrival at the Burlington facility, discussed with former RCA managers Mesnick's many performance problems. (Pet. App. B-6). In particular, Georgiou was told that Mesnick had shown himself to be a "vulgar, bigoted, sexist lout who insulted subordinates, offended clients [and]

drank to excess during lunch. . . ." (Pet. App. A-3-4). Based upon these discussions and his own observation of Mesnick's performance, Georgiou, in March, 1987, gave Mesnick a performance review. (Pet. App. B-6). In this evaluation, Georgiou acknowledged Mesnick's technical abilities, but also noted several recurring criticisms of his behavior. (Pet. App. B-6-7).

Mesnick disputed Georgiou's evaluation of his peformance and began sending him offensive memoranda in an attempt to have the review modified. (Pet. App. B-8). Following a meeting with Georgiou at which he again sought to have his evaluation changed, Mesnick attempted to go over Georgiou's head to the facility's top executive, Capodici. (Pet. App. A-6). Specifically, Mesnick authored a memorandum to Capodici in which he vitriolically castigated Georgiou as "extremely crass and unprofessional" and complained generally about his leadership of the Finance section. (Pet. App. A-6; B-10-11).

Thereafter, Mesnick boldly and insubordinately proposed to Capodici that he remove the Contracts area from the supervision of Georgiou, whom he accused of being incompetent. (Pet. App. B-11). In September, 1987, Mesnick prepared and presented a slide show for Capodici in which he referred to General Electric's acquisition of RCA as "bad news" and criticized Georgiou as incompetent, unprofessional and lacking in judgment. (Pet. App. A-6-7; B-12).

In the same vein, prior to a fall 1987 meeting between Capodici and the Contracts personnel, Mesnick prepared and distributed to his subordinates a list of inflammatory issues for them to raise with Capodici at the meeting. (Pet. App. B-12). Mesnick characterized General Electric employees as "either inexperienced or unqualified" and stated that working under the supervision of General Electric's Finance Management was a "big joke" and like "pitching pennies into a bottomless jar and trying to fill it up." (Pet. App. B-12). In this same time frame, he attempted to gut the department by orchestrating a mass exodus of employees to a rival company. (Pet. App. A-7; B-13). By

this time, Mesnick was openly critical of Georgiou's judgment and abilities. (Pet. App. B-11-12).

The merger and subsequent reorganization had changed staff positions and reporting relationships considerably. New positions were created in many areas of the company, including Finance and Contracts. (Pet. App. A-5; B-9). As part of this overall reorganization, Georgiou decided to create the position of Manager of ASD Contracts to be responsible for the contracts function at both the Burlington and the Huntsville facilities. (Pet. App. A-5; B-9). Mesnick learned of the creation of this new position in April of 1987, and in a conversation shortly thereafter, he and Georgiou discussed the new position. *Id.* When Georgiou informed Mesnick that he could apply and be considered for the job, Mesnick responded "What, in front of the hanging judge?" (referring to Georgiou). (Pet. App. A-5-6; B-9-10). Consistent with his contempt for Georgiou and General Electric management generally, Mesnick never applied for the new position. (Pet. App. A-7).

The actual hiring process took several months. General Electric first considered internal candidates and then also solicited outside applicants through a placement agency.[2] (Pet. App. B-13, n.4). While Mesnick knew that candidates were being interviewed, he did not apply for the position. (Pet. App. A-7). Instead, he authored still another memorandum to Capodici,

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[2] As purported evidence of age discrimination, Mesnick presented two "isolated tidbits." (Pet. App. A-32). First, Mesnick presented a single hearsay comment attributed to Georgiou, on the occasion of another employee's resignation, that he was sad to lose the youth of the workforce. The First Circuit found that this comment did not indicate a bias against older workers. (Pet. App. A-32). Second, Mesnick presented evidence that the ages of the applicants for the Manager of ASD Contracts position were supplied to General Electric by an outside placement agency. Again, the First Circuit dismissed this evidence as lacking any probative value and chastised Mesnick for failing to offer any evidence, despite ample time for discovery, that General Electric requested or even desired such information. (Pet. App. A-34-35).

explicitly criticizing Georgiou's lack of integrity, professional honesty and competence. (Pet. App. A-7; B-14). The candidate selected for the position, Steven Tubbs, was not the youngest candidate and was himself in the protected age group. (Pet. App. A-7; B-13, n.4).

On November 20, 1987, Georgiou informed Mesnick that General Electric had hired Tubbs for the new position of Manager of ASD Contracts. (Pet. App. B-13). Georgiou also explained that Mesnick's new position would be "Contract Manager - Special Projects," a position involving troubleshooting in the area of Contracts, creating the policies under which the new organization would operate, continued work in the area of government procurement and other specific projects. *Id.* Mesnick's new position was at the same salary and grade as his prior position and was just the type of individual contributor role into which RCA management had decided to move Mesnick immediately prior to the merger. (Pet. App. A-7).

Tubbs began working for General Electric on December 14, 1987. (Pet. App. B-14). From this date forward, Mesnick's conduct worsened still further. Mesnick became openly hostile toward Georgiou, Tubbs and management in general, as exemplified by such incidents as his disturbance of an outside consultant's presentation at the facility (Pet. App. B-14-15) and his use of the most profane of epithets to Capodici's face. (Pet. App. A-8). Despite being warned again for attendance and tardiness problems (Pet. App. A-8; B-15-16), these problems continued as well as his habit of drinking alcoholic beverages at lunch. (Pet. App. B-16). In addition, Mesnick persisted in preparing and distributing memoranda which were bitingly critical of his superiors' performance. (Pet. App. B-18).

In the spring of 1988, Mesnick engaged in still more provocative behavior, including his insubordinate refusal to comply with a company requirement to complete the self-evaluation portion of the evaluation process. (Pet. App. B-18). Meanwhile, the stream of hostile memoranda continued un-

abated, culminating in a blistering June 22nd memorandum to Capodici in which Mesnick excoriated Georgiou's "professional ignorance" and Tubbs' "less than average professional stature." (Pet. App. A-9; B-18). On July 18, 1988, Capodici informed Mesnick that he considered this memorandum to be "gross insubordination" and "totally unacceptable" and warned him that any recurrence would constitute "cause for immediate dismissal." (Pet. App. A-9-10; B-20). On the same day, Mesnick received an evaluation from Tubbs (despite his continued refusal to complete his self-evaluation form), which, although recognizing Mesnick's technical experience, stated that such technical abilities were "negated by his lack of interpersonal skills/confrontational attitude, contentiousness, disregard for management direction and policy, and inability/unwillingness to fulfill managerial grade expectations." (Pet. App. A-10; B-19).

In complete disregard for these explicit warnings, Mesnick escalated his assault on his superiors by invoking an internal, government contract auditing procedure (known as a 20.10 report at General Electric) to once again berate Tubbs and even call for his dismissal. (Pet. App. A-11; B-20-21). On August 25, 1988, Mesnick sent Tubbs a critical note which insinuated that Tubbs was somehow negligent. Finally, on September 7, 1988, Mesnick delivered to Tubbs and Georgiou a twelve-page memorandum which renewed the personal attacks included in his June 22nd memorandum. (Pet. App. B-21). On September 16, 1988, having endured over seventeen months of Mesnick's insubordinate diatribes, General Electric finally terminated his employment. (Pet. App. B-21-22).

REASONS FOR DENYING THE PETITION

Mesnick purports to attract this Court's interest by seizing upon a difference in the way the various circuit courts verbalize an evidentiary rule[3] and asserting its relevance to the disposition of his case. Relying upon a solitary sentence in the opinion, Mesnick seeks to resurrect his claims through a purely theoretical discussion which has no evidentiary foundation in the record. This effort must fail. The outcome of this action — regardless of the stage of the burden-shifting paradigm[4] at which Mesnick's proffered evidence is evaluated — is unaffected by the particular formulation attributed to the First Circuit. In no circuit would a case involving such egregious employee conduct be allowed to proceed to a jury.

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[3] The First Circuit, unlike some of its sister courts, has ruled in certain cases that an age discrimination plaintiff who has successfully established a *prima facie* case must prove that the stated reason for the adverse employment action is pretextual and that the real reason for the adverse personnel action was age discrimination. *See, e.g., Medina-Munoz* v. *R.J. Reynolds Tobacco Co.*, 896 F.2d 5, 9 (1st Cir. 1990). *But see Villanueva* v. *Wellesley College*, 930 F.2d 124, 128 (1st Cir.), *cert. denied*, __ U.S. __, 112 S. Ct. 181 (1991) (stating that depending on the facts of the case "[t]here is no absolute rule that a discrimination plaintiff *must* adduce evidence in addition to that comprising the prima facie case and the rebuttal of defendant's justification in order to prevail either at the summary judgment stage or at trial.") (Emphasis in the original.)

[4] A claim of intentional discrimination is usually analyzed using the three-part formula set forth in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973) and further explained in *Texas Dep't of Community Affairs* v. *Burdine*, 450 U.S. 248 (1981). In order to prove intentional discrimination, a plaintiff must first establish a *prima facie* case. *McDonnell Douglas*, 411 U.S. at 802; *Burdine*, 450 U.S. at 252-53. The specific proof required for a *prima facie* case will vary to meet the differing factual situations. *McDonnell Douglas*, 411 U.S. at 802 n.13. Once a plaintiff has established a *prima facie* case, the burden of production shifts to the employer to articulate a legitimate, non-discriminatory reason for the challenged personnel action. *McDonnell Douglas*, 411 U.S. at 802; *Burdine*, 450 U.S. at 253. Despite this shift of the burden of production, the burden of persuasion remains upon the plaintiff at all times. *Burdine*, 450 U.S. at 253. Once a reason is articulated, the inference raised by the plaintiff's *prima facie* case vanishes and the plaintiff must prove that the employer's stated reason was a pretext for discrimination. *Burdine*, 450 U.S. at 253, 255-56.

1. Cases arising under the ADEA are subject to the familiar burden-shifting formula enunciated by this Court in *McDonnell Douglas* and *Burdine*. Consistent with this formula, an employer is not obliged to articulate a legitimate, nondiscriminatory reason for its action — much less have to fend off purported evidence of pretext or motive — until a plaintiff first establishes a *prima facie* case. The evaluation of evidence of pretext or motive is therefore unnecessary — and certainly not dispositive — until a plaintiff has surmounted this preliminary hurdle. Accordingly, any difference between the circuits regarding the treatment of such evidence when evaluating summary judgment motions is not ripe for this Court's consideration unless the plaintiff has clearly made out a *prima facie* case.

Mesnick has not done so here. Indeed, a careful reading of the First Circuit's opinion indicates that Mesnick did not adduce sufficient evidence to meet this initial burden for any of his claims. Specifically, the district court ruled that, because he was unable to prove that he had the requisite qualifications, Mesnick failed to establish a *prima facie* case for his claims that General Electric had discriminatorily failed to promote him, had demoted him, had denied him a merit increase and had discharged him.[5] (Pet. App. B-27-33). Upon review, the First Circuit did not disturb these findings, either concurring in the district court's analysis (claims for failure to promote, demotion and denial of merit increase) (Pet. App. A-17, n.4) or assuming

[5] In order to rule out the possibility that an adverse personnel action was taken for inadequate job performance, a plaintiff must prove, as part of his *prima facie* case for these claims, that he was performing his job at a level that met his employer's expectations. *See, e.g., Loeb* v. *Textron, Inc.*, 600 F.2d 1003, 1012-13 (1st Cir. 1979); *Raschick* v. *Prudent Supply, Inc.*, 830 F.2d 1497, 1499 (8th Cir. 1987), *cert. denied*, 485 U.S. 935 (1988); *Gray* v. *York Newspapers, Inc.*, 957 F.2d 1070, 1078 (3d Cir. 1992); *Elrod* v. *Sears, Roebuck & Co.*, 939 F.2d 1466, 1469-470 (11th Cir. 1991). The district court found that Mesnick was unable to prove that he was performing his job at a level that met General Electric's expectations, and the First Circuit left this finding undisturbed. (Pet. App. A-17 n.4, A-30 n.7; B-27-33.).

otherwise solely for the sake of argument (claim for discriminatory discharge).[6] (Pet. App. A-30, n.7). With respect to the claim for retaliatory discharge, the First Circuit likewise noted the absence of any causal nexus between Mesnick's protected conduct and the adverse employment action (Pet. App. A-43-45), thus precluding Mesnick's establishment of a *prima facie* case of retaliation. *Connell* v. *Bank of Boston*, 924 F.2d 1169, 1179 (1st Cir.), *cert. denied*, __ U.S. __, 111 S. Ct. 2828 (1991); *Oliver* v. *Digital Equip. Corp.*, 846 F.2d 103, 110-11 (1st Cir. 1988).[7] Having thus found deficient each of Mesnick's efforts to meet this preliminary burden, evidence of pretext or unlawful motive was not essential to the case's ultimate disposition and thus any technical distinction among the circuits regarding the presentation of such evidence is not outcome determinative.

In short, Mesnick's argument is predicated on the faulty assumption that the disposition of this case necessarily turned on the technical issue purportedly in conflict among the circuits, *i.e.*, whether evidence of pretext alone is sufficient to allow a discrimination case to reach a jury. In fact, this case was ripe for summary judgment before ever reaching that issue. The First Circuit discussion of pretext and motive — stated to be

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[6] As stated, the First Circuit did not alter the district court's finding that Mesnick had failed to establish a *prima facie* case for his other claims because he was unable to satisfy the requirement that he was performing his job at a level that met General Electric's expectations. *See* footnote 5, *supra*, and accompanying text. A *prima facie* case for discriminatory discharge contains this same requirement. *Olivera* v. *Nestle Puerto Rico, Inc.*, 922 F.2d 43, 45 (1st Cir. 1990). Accordingly, the First Circuit, had it elected to analyze whether Mesnick met this initial burden for his discriminatory discharge claim, could only have concluded that he did not.

[7] The requirement of a causal nexus between the protected activity and the adverse personnel action as an element of the *prima facie* case of retaliation is not peculiar to the First Circuit. *See, e.g.*, *Hollander* v. *American Cyanamid Co.*, 895 F.2d 80, 85 (2d Cir. 1990) (ADEA case); *Johnson* v. *Sullivan*, 945 F.2d 976, 980 (7th Cir. 1991) (Title VII case); *Dwyer* v. *Smith*, 867 F.2d 184, 190-91 (4th Cir. 1989) (same); *McKenna* v. *Weinberger*, 729 F.2d 783, 790 (D.C. Cir. 1984) (same).

merely for the sake of argument[8] — only demonstrated that Mesnick's claim would also have expired at a later stage of *Burdine*'s analytical scheme. Because Mesnick was unable to establish a *prima facie* case on any of his claims, no basis exists to assert that the geographic origin of this fact-specific case affected its judicial treatment and ultimate outcome. Accordingly, no inter-circuit conflict warranting this Court's attention is presented.

2. Even if the record were clear that Mesnick had established a *prima facie* case and therefore had reached the issue of pretext within the *Burdine* formula, the particular rule of evidence attributed to the First Circuit by Mesnick still would have had no bearing on the disposition of this case.

It is undisputed that General Electric, although recognizing Mesnick's technical experience, nonetheless terminated his employment due to his constantly abusive and insubordinate behavior. Nothing in the record in any way detracts from the credibility of this stated reason. Contrary to language contained in the petition, no evidence was presented to support the proposition that General Electric was "lying" about the reason for its decision.[9] Indeed, the petition's statement of facts either concedes or leaves undisputed the fact that Mesnick repeatedly harangued General Electric managers over many months. (Pet. 4-13). Thus, while it may be true that the outcome of other cases might be affected by the circuits' differing formulations of this rule of evidence where at least some evidence is adduced that the employer lied when explaining its action, this is not such a case.

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[8] That the First Circuit continued its discussion through the burden-shifting formula despite Mesnick's failure to surmount the preliminary hurdle of establishing a *prima facie* case in no way affects this conclusion. Indeed, this further *arguendo* discussion appears to be directly related to the First Circuit's interest in defining the analytical framework within which future motions for summary judgment should be evaluated.

[9] Each of Mesnick's primary arguments in support of his petition erroneously assumes that evidence was presented that General Electric was "lying about its reason for the adverse employment decision." (Pet. 16, 20). No such evidence was offered here.

Indeed, where the plaintiff presents no evidence showing the employer's proferred reason is unworthy of credence, he must instead persuade the court that "a discriminatory reason more likely motivated the employer." *Burdine*, 450 U.S. at 256. It is precisely because Mesnick adduced no evidence calling into question General Electric's explanation for its decision to terminate his employment that both courts below, consistent with *Burdine*'s directive, searched the record for evidence of a discriminatory motive. Having found none,[10] the case's summary disposition was fully appropriate.

In view of this uncontroverted record, Mesnick's inability to demonstrate a factual dispute regarding General Electric's proffered reason or the legality of its motive is not surprising. Instead, Mesnick relies solely on one sentence in the First Circuit's opinion to launch a wholly theoretical argument. Specifically, within the context of its discussion of the claim of discriminatory discharge, the First Circuit remarked in passing that "Mesnick created a triable issue of fact anent pretext *vel non*." (Pet. App. A-30).[11] Since this remark was itself premised

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[10] As the First Circuit opinion observed, Mesnick offered only "two isolated tidbits to indicate GE's discriminatory animus." (Pet. App. A-32). The district court was equally unimpressed by the probative value of such evidence. (Pet. App. B-25-26). *See* footnote 2, *supra*.

[11] The meaning of this gratuitous remark is somewhat obscure. Nowhere in the First Circuit opinion is there any discussion of evidence of pretext, much less evidence which creates a factual question regarding General Electric's explanation for its actions. In addition, the First Circuit did not disturb the district court's finding that Mesnick was unable to establish a *prima facie* case for discriminatory discharge and simply discussed *arguendo* the effect of the remainder of the *Burdine* formula on this claim. *See* footnote 6, *supra*. As a result, it is clear that this dictum was not intended to transform this case, involving patently unworthy claims, into a test case for this Court's consideration. In all likelihood, this passing reference relates only to Mesnick's admitted technical skills and its inclusion simply provided the First Circuit with an opportunity to explicate further the analytical scheme applicable to future dispositive motions. Because Mesnick's technical experience is inapposite to the reason for his termination, i.e., gross insubordination, any evidence of such experience is not probative on the issue of pretext.

upon a mere *arguendo* assumption that a *prima facie* case had been established, it is clearly dictum. (Pet. App. A-30, n.7).

Clutching at this slender reed, Mesnick strains to construct an abstract argument, entirely divorced from the reality of this record, which asserts that an employee who exposes the falsity of his employer's stated reason should not be required to produce additional evidence of a discriminatory motive to get to a jury. Whatever the proper resolution of this question, it is irrelevant here where no evidence exists to question the credibility of the employer's explanation.

CONCLUSION

The petition for a writ of certiorari should be denied.

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